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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WARREN GARDNER, et al., Plaintiffs, v. STARKIST CO., Defendant.	Case No. 3:19-cv-02561-WHO **JOINT DISCOVERY DISPUTE STATEMENT REGARDING PLAINTIFF DEPOSITIONS** Hon. William H. Orrick
TARA DUGGAN, et al., Plaintiffs, v. TRI-UNION SEAFOODS, LLC, Defendant.	Case No. 3:19-cv-02562-WHO

Pursuant to the Court's Standing Order for Civil Cases, the parties respectfully submit the following Joint Discovery Dispute Statement and request that the Court enter the accompanying Proposed Order. The parties' sole dispute is whether the Court should adopt Defendants' or Plaintiffs' version of paragraph 2 of the Proposed Order.

Plaintiffs' Statement

Gardner v. StarKist Co., No. 3:19-cv-02561-WHO ("*Gardner*") and *Duggan v. Tri-Union Seafoods, LLC, dba Chicken of the Sea Int'l, Inc.*, No. 3:19-cv-02562-WHO ("*Duggan*") were deemed related on December 9, 2019 (*Gardner*, Dkt. No. 72), but those cases have never been coordinated, consolidated, or otherwise joined for any purpose. Twenty-one (21) Plaintiffs sued StarKist in *Gardner.* Sixteen (16) Plaintiffs sued Chicken of the Sea ("COSI") in *Duggan*. Among the two cases, there are twenty-four (24) unique Plaintiffs, thirteen (13) of whom sued both Defendants. The Parties dispute centers around the eleven (11) "Non-Crossover Plaintiffs"[1] that sued only StarKist or COSI, but not both.

By way of background, the Parties have been negotiating a stipulation to allow defense counsel in both Actions to coordinate the depositions of the thirteen "crossover" Plaintiffs. Defendants, however, have demanded that they also be permitted to attend and individually question each of the eleven Non-Crossover Plaintiffs that have sued only one of the Defendants. While Plaintiffs agree that coordinating the depositions of the crossover Plaintiffs promotes efficiency, those gains do not justify Defendants' demand to also depose Plaintiffs that did not sue their client and who will not otherwise participate in the other case.

To be sure, Plaintiffs' Counsel has no intention of using the Non-Crossover Plaintiffs as witnesses in the other litigation, in part because most did not even purchase the tuna products of the other Defendant. Absent a stipulation by Defense Counsel in both cases that the Parties may treat StarKist's and COSI's dolphin safe promises as identical (meaning, for example, that either Defendant's internal documents assessing the materiality of their dolphin

[1] The Non-Crossover Plaintiffs are: Warren Gardner, Tara Duggan, Autumn Hessong, Heather Meyers, Kathleen Miller, Amar Mody, Heena Mody, Rachel Pedraza, Jason Petrin, Amy Taylor, and Tara Trojano.

safe promises or advertising can be applied with equal force to the other Defendant, or that a survey of consumers regarding either Defendant's packaging and advertising can be applied equally to both cases), then there is no basis to Defendants' argument that the testimony of a StarKist consumer is relevant to issues in the COSI litigation. And though the Parties have met and conferred on this issue, neither Defendant has yet offered any explanation of how the testimony of the Non-Crossover Plaintiffs would be relevant to their case, much less how their testimony is necessary.

Even *if* some of these Non-Crossover Plaintiffs *had* purchased the tuna sold by the other manufacturer that they did not sue, there is no legal basis to permit their depositions, even as absent class members. "Absent class members are not ordinarily required to submit to discovery….." *See Tierno v. Rite Aid Corp*., 2008 WL 2705089, at *6 (N.D. Cal. July 8, 2008). Indeed, such discovery has only been permitted in limited circumstances, such as "where the information sought is relevant, not readily obtainable from the representative parties or other sources, and the request is not unduly burdensome and made in good faith." *Id.* "Applying these principles, courts have found the burden on the defendant to justify discovery of absent class members by means of deposition is particularly heavy." *See*, *Cornn v. United Parcel Service, Inc.*, 2006 WL 2642540, *2 (N.D. Cal. Sept. 14, 2006). Defendants cannot meet this burden, in part because they cannot show the information they seek is not readily obtainable from the representative parties themselves.

StarKist has twenty-one (21) Plaintiffs that sued them to depose and COSI has sixteen (16). Neither Defendant has sought leave of Court to exceed the 10 deposition limit in Fed. R. Civ. Pro 30(a)(2), nor have they asked Plaintiffs to stipulate to any number of depositions that would exceed that limit. From the stable of Plaintiffs that actually sued each Defendant, there is ample opportunity to discover information relevant to consumer class members for class certification purposes. There is no need for each Defendant to depose eleven *more* tuna consumers, particularly those that did not purchase their client's tuna.

Perhaps more importantly, the Non-Crossover Plaintiffs have not "injected" themselves into the other litigation in any way. For example, courts sometimes permit a

defendant to depose an absent class member where plaintiff's counsel has identified those absent class members as potential witnesses, or where they submitted factual declarations to be used in the case. That is simply not the case here. *Cf. Moreno v. Autozone, Inc.*, 2007 WL 2288165, at *1 (N.D. Cal. Aug. 3, 2007) (noting "[d]iscovery of absent class members is generally not allowed" but permitting depositions "only of those absent class members who have injected themselves into the class certification motion by filing factual declarations"); *Brown v. Wal-Mart Store*, *Inc.*, 2018 WL 339080, at *1-2 (N.D. Cal, Jan. 9, 2018) (finding defendant had "met its burden to take the depositions of the eight absent class members" where plaintiffs' counsel had identified those individuals as potential witnesses in their pre-trial disclosures and thus had "injected" them into the litigation.) Defendants' argument that the Non-Crossover Plaintiffs have "injected" themselves into the other litigation merely by suing their case alongside *other Plaintiffs* that have injected themselves strains the bounds of reason.

The inquiry here is not a balancing test between need and burden. Defendants have a "heavy burden" to demonstrate these depositions are warranted and necessary. They have not carried that burden.

Defendants' Statement

On May 13, 2019, Plaintiffs' counsel filed purported class actions against the three leading U.S. tuna brands—StarKist, COSI, and Bumble Bee.[2] All three suits allege that tuna products are labeled as, but not actually, "Dolphin Safe." Eleven named plaintiffs overlap between all three actions and thirteen overlap between these *Gardner* and *Duggan* actions. Four of the eleven Non-Crossover Plaintiffs ("NCPs") also sued Bumble Bee. Given the overlap in Plaintiffs and subject matter, Defendants informed Plaintiffs that they planned to minimize the burdens for all parties by cross-noticing Plaintiff depositions, including NCP depositions, so that Plaintiffs would only need to be deposed once. Plaintiffs refused to agree to joint NCP depositions, first based on a presumption against absent class member discovery

[2] *Duggan v. Bumble Bee Foods LLC*, No. 4:19-cv-02564-JSW, has been subject to a bankruptcy stay since November 2019 and was never formally related to the other cases.

and now also arguing that certain unspecified NCPs are not absent class members. Both arguments miss the point that the NCPs are all percipient witnesses who allege that they were misled by the same "Dolphin Safe" labeling employed across the U.S. tuna industry.

Plaintiffs' reliance on cases regarding "absent class member" discovery is misplaced. The non-party Defendants have every right to depose the NCPs under the plain language of Rules 26 and 30, regardless of their status as "absent class members." Because this litigation involves related actions based on the same allegation (*i.e.*, that the words "dolphin safe" on packaged tuna are misleading to consumers), the testimony of the NCPs is highly relevant to class certification issues in both actions. And, unlike typical "absent class member" discovery, the depositions at issue here will occur either way. Moreover, the NCPs are represented by the same counsel in both actions, and the non-party Defendants have agreed to ask only non-duplicative questions while staying within Rule 30's single deposition time limit. Indeed, Plaintiffs' argument that this is impermissible because some of the NCPs are not absent class members (and their failure to identify which are or are not) reflects their ongoing strategy to treat these cases as related when it suits their needs (*e.g.*, insisting on a common due date for class certification motions so that one Defendant does not get a preview, and the stipulation demand added at the eleventh hour to their statement above), but objecting to such treatment when they find it detrimental (*e.g.*, refusing to produce the same documents to both Defendants, and serving third-party subpoenas relevant to both actions exclusively in one action with no notice to the other Defendant).

To the extent the Court does view this as a request for "absent class member" discovery, the result is no different. District courts in the Ninth Circuit have "discretion to allow limited discovery from absent class members if the particular circumstances of a specific case justify it." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 n.10 (9th Cir. 2017). As reflected in Plaintiffs' cases, "the rules pertaining to [absent class member] discovery are flexible, especially where the proposed deponents have been identified as potential witnesses or have otherwise 'injected' themselves into the litigation," *Brown*, 2018 WL 339080, at *1; and "such discovery may be taken even prior to certification if the

proponent of the deposition demonstrates discovery is not sought to take undue advantage of class members or to harass class members, and is necessary to . . . preparation of the opposition to class certification," *Moreno*, 2007 WL 2288165, at *1; *see also A.B. v. Pac. Fertility Ctr.*, 2019 WL 6605883, at *1 (N.D. Cal. Dec. 3, 2019) (recognizing propriety of a deposition where "the absent class member was a percipient witness").

Plaintiffs' assertion that the NCPs have not injected themselves into the related cases is incorrect. While the NCPs may not have technically sued both Defendants, all Plaintiffs were willing participants in parallel, counsel-coordinated class actions alleging common misrepresentations. In these "particular circumstances," the NCPs have injected themselves far more than absent class members found properly subject to discovery based on initial disclosures or declarations. *See, e.g.*, *Brown*, 2018 WL 339080, at *1; *Mas v. Cumulus Media Inc.*, 2010 WL 4916402, at *3 (N.D. Cal. Nov. 22, 2010); *Moreno*, 2007 WL 2288165, at *1.

Plaintiffs' argument regarding relevance is wrong as a matter of law: "nearly every absent class member potentially possesses information relevant to certification." *Pac. Fertility Ctr.*, 2019 WL 6605883, at *1 (authorizing interrogatories to former named plaintiffs). This is especially true here, where Plaintiffs have articulated identical arguments for predominance and commonality in the related actions. *Compare Gardner* SAC (Dkt. 75) ¶¶ 151, 158; *with Duggan* SAC (Dkt. 54) ¶¶ 106, 113.

Plaintiffs' contention that such discovery is unnecessary reflects an attempt to supplant their judgment for Defendants' regarding which depositions will best facilitate the preparation of oppositions to class certification. Defendants do not presently intend to exceed Rule 30's ten deposition limit, so the issue is purely which Plaintiffs will be deposed, not how many. In fact, by agreeing to depose Plaintiffs once rather than twice, Defendants have drastically reduced the number of depositions in these actions. In this context, there is no basis under rule or law to prohibit both Defendants from deposing NCPs who have alleged they were deceived by "dolphin safe" labeling, whose testimony will thus bear on key class certification issues in both actions, and who will face no meaningful burden from an additional Defendant's limited participation in their depositions.

Dated: July 8, 2021

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ATTESTATION STATEMENT

Pursuant to Civil L.R. 5-1(i)(3), I attest that the other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: July 8, 2021

/s/ Roxane Polidora
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